proportion of BPP costs allocated to the intrastate jurisdiction.[70] Because these comments conflict with the Commission's tentative conclusion not to convene a joint board to address the cost allocation issues associated with BPP implementation,[71] this is another issue which the Commission probably would need to revisit if BPP is mandated.

IV. IMPOSITION OF A RATE CAP OR USE OF "BENCHMARK" RATE REGULATION IN CONNECTION WITH THE OPERATOR SERVICES INDUSTRY WOULD BE UNWISE AS A MATTER OF POLICY AND INCONSISTENT WITH THE COMMUNICATIONS ACT AND RELEVANT CASE LAW

27. Another issue which surfaced in a few of the comments filed in response to the FNPRM, even though it was not raised by the Commission in the FNPRM, is whether the Commission, as an alternative to BPP, should impose some form of rate regulation on OSPs.[72] Generally speaking, these commentors suggest that the impetus for the FNPRM is a desire to lower the rates of OSPs which charge more than the "industry average" for operator assisted calls.[73] These commentors fall into two broad

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[70] Comments of NARUC at 5; Comments of SNET at 8; Comments of the Virginia State Corporation Commission Staff ("Virginia") at 2.

[71] FNPRM at ¶ 60.

[72] Comments of AT&T at 9-10; Comments of Bell Atlantic at 3; Comments of Idaho at 3 and 4; Comments of NASUCA at 4-5; Comments of the NCPA at 3; Comments of Teleport at 17; Comments of TelTrust at 13-16; Comments of Virginia at 2; Comments of APCC at 30-32; Comments of CompTel at 39-46; Comments of NYNEX at 13; Comments of Intellicall at 5-7.

[73] A number of commentors, however, argue that the Commission should not impose any industry-wide rate regulation on OSPs. Comments of Idaho at 3-4; Comments of NASUCA at 4-5.

categories: (1) those that appear to favor a rate cap on all OSPs based on an "industry average" or on the rates charged by one or more of the industry's largest carriers;[74] or (2) those that urge the Commission to impose some form of "benchmark" rate for OSPs, again presumably based either on an industry average or the rates of one or more of the large carriers, whereby rates below the "benchmark" would be presumed lawful, but those above the "benchmark" would need to be cost-justified.[75]

A. Imposition Of A Rate Cap On Operator Service Providers Would Be Unwise As A Matter Of Public Policy

28. As the Commission determined back in 1989, OSPs are nondominant carriers.[76] As nondominant carriers, OSPs by definition lack sufficient market power to charge unjust and unreasonable rates within the meaning of the Act.[77] It therefore would defy logic for the Commission to impose a rate cap on OSPs based on the suggestion of some commentors that the rates charged by certain OSPs are unjust and unreasonable because the Commission itself has found that OSPs, as nondominant carriers, cannot charge unjust and unreasonable rates.

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[74] Comments of Bell Atlantic at 3; Comments of NCPA at 3; Comments of Teleport at 17; Comments of Teltrust at 13-16; Comments of Virginia at 2.

[75] Comments of APCC at 30-32; Comments of CompTel at 39-46; Comments of Intellicall at 5-7; Comments of NYNEX at 13.

[76] Telecommunications Research and Action Center and Consumer Action, 4 FCC Rcd 2157, 2158 (1989) ("TRAC Order").

[77] See Policy and Rules Concerning Rates for Competitive Common Carrier Services, 91 F.C.C.2d 59 (1982).

29. Moreover, if as nondominant carriers OSPs lacked sufficient market power to charge unjust and unreasonable rates in 1989 when the Commission issued the TRAC Order, they certainly possess even less market power today. Since that time, the consumer protection requirements of TOCSIA have been enacted and implemented so consumers may easily dial-around OSPs which, in the eyes of the consumer, charge too much for operator-assisted calls. In fact, the Commission itself indicated in the TOCSIA Report that "in the increasingly rare cases in which OSPs publish rates that are substantially higher than both AT&T's rates and the industry average, consumers are able to ensure they are actually paying reasonable charges by dialing around these OSPs to their carrier of choice."[78/] As such, it is clear that OSPs today possess even less market power than they did in 1989 when the Commission found them to be nondominant carriers.

30. Finally, apart from the legal obstacles discussed below to imposition of OSP rate regulation, such regulation would be extremely unwise as a matter of policy because of the burdens it would impose upon the Commission and its Staff to engage in individualized rate making for hundreds of OSPs. As explained below, as a legal matter, at a minimum the Commission would be required to examine the individual cost structure of each OSP whose rates it wished to review. The Commission has some recent experience with the tremendous drain on its resources which this type of rate regulation entails in the cable area, and it is

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78/ TOCSIA Report at 19.

unlikely the Commission would receive the additional funding from Congress which would be required to regulate the rates of hundreds of OSPs.

B. Imposition Of A Rate Cap On Operator Service Providers Would Violate The Rate Regulation Provisions In Section 226 And Other Parts Of The Communications Act

31. Typical of the comments urging the Commission to establish a rate cap on OSPs, sometimes referred to as a rate ceiling by some of the commentors, are the comments of NYNEX which indicate that "the Commission simply has to cap OSP rates at a reasonable level [to protect consumers from being overcharged on operator service calls]."[79/] While most of these commentors did not refer to any authority by which the Commission could impose a rate cap on OSPs, a few claimed that Section 226(h) of the Act,[80/] which specifically concerns OSPs, and the more general provisions contained in Title II of the Act,[81/] provide the Commission with the requisite authority.[82/]

32. A careful reading of Section 226(h) and its legislative history demonstrates that the Commission does not have authority under the section to impose a rate cap on OSPs. For one thing, there are only two subsections in Section 226(h) which even

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79/ Comments of NYNEX at 13.

80/ 47 U.S.C. § 226(h) (1994).

81/ See 47 U.S.C. §§ 201(b) and 205(a) (1994).

82/ Comments of AT&T at 9-10; Comments of Teltrust at 14.

arguably give the Commission authority to regulate OSP rates, Sections 226(h)(2) and 226(h)(4)(A),[83] but it appears that the authority of the Commission under both provisions expired over a year ago.

33. Section 226(h)(4)(A) gave the Commission 180 days from the date the TOCSIA Report was submitted to Congress to complete a rulemaking proceeding aimed at ensuring that the rates charged by OSPs are just and reasonable. Not only did the 180 day period established in Section 226(h)(4)(A) for completion of the rulemaking proceeding expire long ago,[84] but commencement of such a proceeding was conditioned on the Commission finding in the TOCSIA Report that the rates charged by OSPs are unjust and unreasonable. In the TOCSIA Report, however, the Commission determined therein that "market forces are securing just and reasonable rates."[85] Accordingly, the Commission's rate

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[83] Section 226 (h)(2) provides:

> If the rates and charges filed by any provider of operator services under paragraph (1) [which requires OSPs to file informational tariffs with the Commission] appear upon review by the Commission to be unjust or unreasonable, the Commission may require such provider of operator services to ... demonstrate that its rates and charges are just and reasonable. 47 U.S.C. § 226(h)(2) (1994).

Section 226(h)(4)(A) provides:

> Unless the Commission [determines in the TOCSIA Report that market forces are securing just and reasonable OSP rates], the Commission shall, within 180 days after submission of the report required under paragraph (3)(B)(iii) [the TOCSIA Report], complete a rulemaking proceeding pursuant to this title (and paragraphs (1) and (2) of this subsection) that rates and charges for operator services be just and reasonable. 47 U.S.C. § 226(h)(4)(A) (1994)

[84] Based on the date the TOCSIA Report was submitted to Congress, November 13, 1992, the Commission had until May 1993 to complete the rulemaking proceeding referred to in Section 226(h)(4)(A).

[85] TOCSIA Report at 2.

regulation authority under Section 226(h)(4)(A) obviously has expired.

34. Moreover, because the Commission's authority under Section 226(h)(4)(A) has expired, it appears its authority under Section 226(h)(2) also has expired. The reason for this is that whatever rate regulation authority the Commission possesses under Section 226(h)(2) is specifically tied to conduct of the aforementioned rulemaking proceeding contemplated by Section 226(h)(4)(A). Section 226(h)(4)(A) states that the Commission was to have exercised its rulemaking authority, if at all, to establish regulations for "implementing the requirements of this title (and paragraphs (1) and (2) of this subsection) [emphasis added] that rates and charges for operator services be just and reasonable."[86/] Because the Commission failed to complete, or even initiate, the rulemaking proceeding provided for in Section 226(h)(4)(A) within the specified 180 day period, its authority to engage in any form of rate regulation of OSPs pursuant to Section 226(h)(2) apparently expired with the expiration of its authority under Section 226(h)(4)(A).

35. Section 226's legislative history shows that the Senate considered giving the Commission authority to impose a rate ceiling on OSPs, but deleted the provision which would have provided the Commission with this authority before final passage

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[86/] The reference to paragraph (2) in Section 226(h)(4)(A) is to Section 226(h)(2) which, as noted above, is suggested by some commentors to authorize the Commission to impose a rate cap on OSPs. 47 U.S.C. § 226(h)(4)(A).

of the bill that eventually added Section 226 to the Act.[87] Specifically, as introduced in the Senate, the bill provided as follows:

> If the Commission finds ... that consumers are not benefiting from a competitive market for operator services, the Commission shall have the authority to establish ceilings for the rates charged by providers of operator services, based upon the rates charged by the largest carrier in the interstate operator services market.[88]

However, this provision was deleted from the bill before it was approved by the full Senate, and was not included in the bill that ultimately was signed into law.[89] The Commission's position opposing a rate ceiling was instrumental in deleting the rate ceiling provision from the bill. During testimony on the bill before the Senate Subcommittee on Communications, Richard Firestone, then Chief of the Common Carrier Bureau, expressed serious reservations about the legality of tying one carrier's rates to those of another carrier.[90] He testified that comparing the rates of one carrier to the rates of a competitor,

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[87] S.1660, 101st Cong., 2d Sess. § 6(c) (1990).

[88] Id. The Senate Report on this bill also makes clear that it was intended to give the Commission authority to impose a rate ceiling on OSPs. 1990 U.S. Code Cong. & Admin. News 1577, 1600. Among other things, the Senate Report indicates that, if the bill were to have become law, the Commission would have had authority to establish a rate ceiling on the rates charged by OSPs "based on the rates charged by the largest OSP ... if the [Commission] finds ... that consumers are not benefiting from a competitive market for operator services." Id.

[89] The Congressional Record from October 1, 1990 contains the legislation as it was passed by the Senate, and the provision concerning the establishment of a rate ceiling was no longer incorporated therein. 136 Cong. Rec. S14304 (1990).

[90] Telephone Operator Consumer Services Improvement Act of 1989: Hearings on S.1643 and S.1660 Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, 101st Cong., 2d Sess. (statement of Richard M. Firestone, Chief, Common Carrier Bureau).

rather than focusing on the carrier's rates relative to its own costs, would be improper and perhaps unlawful as it would raise "the Fifth Amendment question of a 'taking' of property without due process of law."[91/] It seems clear, therefore, that Congress did not intend to authorize the Commission to impose a rate ceiling on the rates charged by OSPs.

36. Mr. Firestone was correct when he testified that tying the rates of one OSP to the rates of another likely would be unlawful and unconstitutional to the extent it would set the rate of an OSP based on the rates charged by its competitors rather than that OSP's own costs. In this regard, the courts have long held that, in any consideration of whether the rates of a carrier are just and reasonable under Title II of the Act, "costs are generally the principal points of reference."[92/] The Commission itself repeatedly and for many years has recognized that "the standard by which the justness and reasonableness of rates are

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91/ Id. at 53. By imposing a rate cap on OSPs which has no relation to their individual costs, some OSPs might be unable to recoup sufficient revenue to cover their costs. Such a result clearly would violate the Fifth Amendment to the Constitution which prohibits the federal government from taking private property for public use without just compensation. U.S. Const. amend. V. In this regard, the Supreme Court has ruled that rates which are not sufficient to yield a reasonable return on investment are confiscatory, and has found that their imposition deprives regulated entities of their property in violation of the Constitution. Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n, 262 U.S. 679, 690 (1923); see also Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944) (return on equity must be "sufficient to assure confidence in the financial integrity of the enterprise"); Permain Basin Area Rate Cases, 390 U.S. 747, 792 (1968) (rates must "maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed").

92/ Ohio Bell Tel. Co. v. Fed. Communications Comm'n, 949 F.2d 864, 867 (6th Cir. 1991) (a carrier is permitted to charge rates that allow it to recover costs and earn a reasonable rate of return on its invested capital); see also MCI Telecommunications Corp. v. Fed. Communications Comm'n, 675 F.2d 408, 410 (D.C. Cir. 1982).

measured is whether they are based on the costs of providing service."[93/]

37. Obviously, imposition of any generic rate cap on OSPs would be inconsistent with the requirement that the individual costs of carriers be taken into account by the Commission when evaluating rates. An industry-wide rate cap, by its very nature, could not possibly take into account the varying cost structures of each OSP. As the Commission determined in connection with an earlier request for imposition of a generic rate cap on OSPs, "the quantity and quality of services vary among carriers as do their underlying cost structures, all of which could support significant differences in rate levels."[94/] As such, establishment of an industry-wide rate cap for the entire OSP industry based on some other carrier's or carriers' rates would be inconsistent with relevant precedent of both the Commission and the courts interpreting the agency's authority under Title II of the Act.

[93/] AT&T Communications Tariff F.C.C. No. 1, 103 F.C.C.2d 134, 149 (1985); see also Amendment of Part 61 of the Commission's Rules Relating to Tariffs and Part 1 of the Commission's Rules Relating to Evidence, 40 F.C.C.2d 149, 154 (1973) ("Tariffs-Evidence").

[94/] TRAC Order, 4 FCC Rcd 2157, 2158 (1989) (no Commission precedent exists which would support the "proposition that a carrier's rates can be found 'unjust and unreasonable' solely on the basis that they exceed the rates of some other carrier").

C. Use Of "Benchmark" Rate Regulation In Connection With Operator Service Providers Likely Would Be Inconsistent With The Communications Act And Impose Enormous Burdens On The Commission And Large Numbers Of Operator Service Providers

38. As mentioned above, some commentors suggest that, rather than impose an actual rate cap on OSPs, the Commission should engage instead in some form of "benchmark" rate regulation of OSPs. For example, CompTel suggests that under a "benchmark" rate scheme OSP rates at or below a "benchmark" established by the Commission would be presumed lawful, but those above the "benchmark" would have to be cost-justified in an investigation.[95/] CompTel argues that the Commission has authority to employ "benchmark" rate regulation pursuant to the aforementioned rate regulation provisions contained in Section 226(h) and other parts of Title II.[96/]

39. Despite these claims, it appears that the Commission does not have authority under the Act or relevant case law to engage in "benchmark" rate regulation of the OSP industry. To start with, as explained above, any such authority that the Commission once may have enjoyed pursuant to Section 226(h) has expired. Moreover, as explained above, the Commission is required under Title II to take the individual costs of carriers into account when determining whether rates are just and

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95/ Comments of CompTel at 39.

96/ Id. at 39-40.

reasonable.[97] The Commission itself repeatedly has recognized that its policy is to regard costs either as "directly controlling in the fixing of rates or as benchmarks from which to measure any departures from costs with a clear and persuasive showing required for such departures."[98]

40. In light of the foregoing, use of "benchmark" rate regulation as conceived by CompTel would be inconsistent with the Act and relevant precedent because the "benchmark" necessarily would be set at an arbitrary level with no consideration given to the cost structures of individual OSPs. CompTel does not purport to suggest how such a "benchmark" would be derived, except to question - wisely in CNS's view - whether "OSP rates should be tied to the rates of one competitor."[99] Nonetheless, presumably the rates of one or more of the Big 3 would be used to establish a "benchmark" rate.[100]

41. However, there is no indication that the operator service rates of those carriers are based on costs, or if so, the reasonableness of their costs. Because the Commission is required to take the costs of carriers into account when evaluating rates, as a legal matter, the Commission would be required to determine whether the carrier rates used to develop a

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[97] MCI Telecommunications Corp. v. Fed. Communications Comm'n, 842 F.2d 1296 (D.C. Cir. 1988); City of Brookings Mun. Tel. Co. v. Fed. Communications Comm'n, 822 F.2d 1153 (D.C. Cir. 1987).

[98] Tariffs-Evidence, 40 F.C.C.2d 149, 154 (1973); AT&T Communications Tariff FCC No. 1, 103 F.C.C.2d 134 (1985).

[99] Comments of CompTel at n. 93.

[100] See Comments of NYNEX at 13.

"benchmark" rate are themselves cost-justified. Absent such a demonstration, any attempt at developing a "benchmark" rate would be inconsistent with the foregoing precedent.

V. CONCLUSION

42. For all of the foregoing reasons, as well as those discussed in its initial comments and in the pleadings submitted by it at earlier stages of this proceeding, Capital Network System, Inc. again urges the Commission to terminate this proceeding and, in lieu thereof, use its resources to take the steps described herein and at earlier stages of this proceeding which would lower the operating costs of small, competitive OSPs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carolyn J. Kay, hereby certify that a copy of the foregoing Reply Comments of Capital Network System, Inc. has been served by hand this 14th day of September 1994 on the following:

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